(2)

FILED
FEB 2 3 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1030

IN THE
Supreme Court of the United States

BRANDY M. BRITTON,
Petitioner,

v.

UNIVERSITY OF MARYLAND,
BALTIMORE COUNTY, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari
To the United States Court Of Appeals
For the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DOUGLAS F. GANSLER
Attorney General of Maryland

STEVEN M. SULLIVAN
CYNTHIA G. PELTZMAN*
Assistant Attorneys General
200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6324

Attorneys for Respondents

**Counsel of Record*

QUESTION PRESENTED

Did the court of appeals correctly affirm the district court's entry of summary judgment denying a female professor's claims of gender discrimination in violation of Title VII and 42 U.S.C. § 1983 where the plaintiff failed to meet her burden to establish a *prima facie* case of discrimination based on gender, the employer demonstrated legitimate, non-discriminatory reasons for every one of its actions, and the employee presented no evidence of pretext and, instead, relied solely on unsupported inferences and suppositions that are insufficient as a matter of law to generate a triable issue of fact?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	6
THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.	6
CONCLUSION	8

TABLE OF AUTHORITIES

Page

Cases

Antonio v. Sygma Network, Inc., 56 F.3d 491 (10th Cir. 2006) 7

Evans v. Technologies App. & Serv. Co., 80 F.3d 954 (4th Cir, 1996) 7

McDonnell Douglas v. Green, 411 U.S. 792 (1973) . 5

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) 7

Statutes

42 U.S.C. § 1983 1

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) 1

Court Rules

Rule 35.1 of the Supreme Court Rules 1, 6

STATEMENT OF THE CASE

Petitioner Brandy Britton brought suit against her former employer, the University of Maryland, Baltimore County ("UMBC") and various faculty and administrators of the university, alleging discrimination based on gender in violation of Title VII and 42 U.S.C. § 1983. In an unreported opinion, the district court granted summary judgment in favor of all defendants on all claims. App. 7-8. The circuit court affirmed in an unreported *per curiam* opinion. App. 8-9. On January 27, 2007, four days after her petition for *certiorari* was filed in this Court, Dr. Britton died. At this time, no representative has been substituted as a petitioner pursuant to Supreme Court Rule 35.1.

Dr. Britton was hired as an assistant professor in June 1994 by Dr. Derek Gill, then the chair of UMBC's sociology department. App. 2, 12. In her first several years at UMBC, Dr. Britton was well liked and respected by her colleagues and students and was, in fact, given preferential treatment because of her ability to procure research funding. For instance, Dr. Britton was permitted to carry a lighter teaching load so she could focus on her research. App. 2, 12-13. Though Dean Rickey Welch was concerned that Dr. Britton had not published in her first several years at UMBC, he endorsed Dr. Gill's recommendation to extend Dr. Britton's faculty appointment. App. 2, 13.

Problems first began in June 1997, when Dr. Britton sought to use surplus grant funds for retroactive payment of overtime and child care expenses she had incurred while working on a research project. App. 2, 13. Dr. Britton submitted a request for "overload compensation," which UMBC defined as a sum over and above a faculty member's annualized salary paid contemporaneously or prospectively for additional

teaching or work on special projects. App. 2-3, 13. At the same time, Dr. Kevin Eckert, a male professor, also sought approval for payment of overload compensation for a long term project he had been asked to undertake on behalf of the Shriver Center, an independent organization located on UMBC's campus. App. 3. Though the money sought by Dr. Britton was not technically overload compensation, Dr. Gill endorsed her request and submitted it for approval, along with that of the male faculty member, noting the "extraordinary efforts" of both. App. 3, 13.

Dr. Britton's request for overload compensation was never approved. An unusually high number of requests for overload compensation payable from outside funding sources prompted UMBC to place a temporary freeze on payment of overload compensation. App. 3, 13. As the result of a mistake, Dr. Eckert initially was paid for work he performed for the Shriver Center, despite the freeze, but the funds were subsequently deducted from his salary. App. 4, 21-22.

In September 1997, Dr. Britton was named as the Principal Investigator on a research project funded by a $1.7 million grant from the National Institute for Drug Abuse ("NIDA"). App. 2, 13. After learning that NIDA intended to cut the grant by 10%, Dr. Britton insisted that UMBC make up the difference by forgoing the portion of the grant reserved for UMBC's overhead. App. 4-5. UMBC declined, but offered to donate the services of a fully funded research assistant to the project. App. 5. Dr. Donald Norris, who administered the grant through UMBC's Maryland Institute for Policy Analysis and Research ("MIPAR"), tried to persuade Dr. Britton to conserve grant funds by purchasing cheaper computer equipment, an idea that Dr. Britton rejected, causing

friction between the two of them. App. 5.

Dr. Britton met with Dean Welch, Dr. Gill, and Dr. Norris to address the NIDA grant funding cut. App. 5, 14. The meeting became heated when Dr. Norris again urged Dr. Britton to buy cheaper computers. App. 5. Dr. Norris raised his voice and Dr. Britton accused him of treating her rudely because she was a woman. App. 5, 14. Several weeks later, after relations between Dr. Britton and Dr. Norris continued to deteriorate, Dr. Norris felt he could no longer effectively administer the NIDA grant and transferred it out of MIPAR. App. 5. Nevertheless, Dr. Norris wrote to Dean Welch supporting Dr. Britton's efforts to obtain overload compensation. App. 5.

In late 1997 and early 1998, as work began on the NIDA project, grant employees and graduate students assigned to the project began to complain to other faculty about working conditions under Dr. Britton. App. 5, 14. Other students began to lodge complaints about Dr. Britton's inattention to faculty duties which, in some cases, delayed students' thesis work and timely completion of their degrees. App. 14. One student and one anonymous source submitted written complaints to NIDA accusing Dr. Britton of scientific misconduct and misuse of grant funds. App. 5.

By April 1998, Dr. Britton had filed formal gender discrimination claims against Dr. Gill, Dr. Norris, and other faculty members in the Sociology Department, both male and female. App. 6, 14. Dr. Britton also accused UMBC faculty and administrators of soliciting students to file complaints against her in retaliation for her claims of gender discrimination. App. 5-6. Dr. Britton's claims of gender discrimination were referred to an outside consultant who, after an extensive investigation,

determined that Dr. Britton had failed to present evidence of actionable gender discrimination. App. 14-15.

In July 1999, the Office of Research Integrity ("ORI") of the National Institutes of Health directed UMBC to conduct an investigation into allegations of scientific misconduct by Dr. Britton and to sequester all of the NIDA project files. App. 6, 15. In September 1999, a Committee of Inquiry appointed by UMBC recommended a formal investigation into allegations that Dr. Britton had falsified academic credentials of grant employees, fabricated project data, misused project funds, and terminated a grant employee in retaliation for cooperating with the scientific misconduct investigation. UMBC appointed a Committee of Investigation to conduct the scientific misconduct investigation. App. 6, 15.

Shortly afterward, Dr. Britton withdrew from the tenure process, claiming she was the victim of a hostile work environment. App. 6, 15. Dr. Britton was notified that her withdrawal would result in the automatic termination of her faculty appointment at the end of that academic year. App. 6. A month later, ignoring the fact that the project was subject to a federal scientific misconduct investigation, Dr. Britton removed equipment and materials from the NIDA project office, including data files overlooked in the sequestration process, the project checkbook, keys to the filing cabinet in which data files were kept, and a computer CPU containing project data. App. 6, 15. After being notified that she would be terminated for professional misconduct and willful neglect of duty, Dr. Britton resigned her faculty appointment in December 1998. App. 6-7, 15.

In November 1999, the Committee of Investigation

issued its final report, concluding that Dr. Britton had engaged in scientific misconduct under UMBC's policies. App. 6. The report was submitted to ORI, which ultimately concluded that, under federal regulations, the evidence was insufficient to warrant a finding of scientific misconduct by Dr. Britton.

In its unreported opinion, the district court distilled Dr. Britton's numerous allegations into three claims of gender discrimination: 1) she was denied overload compensation though a male faculty member's request was approved; 2) Dr. Norris transferred her grant out of MIPAR in retaliation for her allegations of gender discrimination; and 3) UMBC faculty and administrators conspired to orchestrate complaints filed with UMBC and ORI. App. 17.

The district court, applying the burden-shifting scheme in *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973), determined that Dr. Britton failed to meet her burden to establish a *prima facie* case of discrimination based on gender because she failed to put forth any evidence of discrimination or harassment and, instead, relied solely on "unsupported inferences. . . ." App. 7-21. Moreover, UMBC demonstrated legitimate, non-discriminatory reasons for every action taken involving Dr. Britton, who failed to point to any evidence to show those reasons were mere pretexts for discrimination based on gender. App. 8, 21-22.

The district court also noted that the majority of Dr. Britton's claims were against Drs. Gill and Norris, who had either hired her, supported her quest for additional compensation, or recommended the extension of her three-year faculty appointment. App. 7, 22.

Thus, in the absence of any evidence showing discriminatory animus, Dr. Britton could not overcome the "same-actor" inference. *See Evans v. Technologies Appl. & Serv. Co.*, 80 F.3d 954, 959 (4th Cir. 1996) (inference that same persons who hired and promoted employee did not act with discriminatory animus). App. 8, 22.

The circuit court affirmed the decision of the district court in an unreported *per curiam* opinion, for the reasons stated by the district court, which the circuit court concluded were correct. App. 7-9.

REASONS FOR DENYING THE WRIT

THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

As a preliminary matter, the Petitioner died on January 27, 2007, four days after filing the petition. No motion has been made to substitute an authorized representative of the deceased Petitioner pursuant to Rule 35.1 of the Supreme Court Rules. *See id.* ("If the substitution of a representative of the deceased is not made within six months after the death of a party, the case shall abate.").

Further review of this case is unwarranted because both unpublished decisions below rest on a fact-specific determination that conforms with prior decisions of this Court and does not conflict with the decision of another United States Court of Appeals. Both courts below concluded that the Petitioner failed to meet her burden of establishing a *prima facie* case of discrimination based on gender and, instead, relied only on unsupported inferences insufficient to generate a triable issue of fact.

App. 7. While both lower courts determined that the employer demonstrated legitimate, non-discriminatory reasons for every one of its actions, the Petitioner presented no evidence sufficient either to rebut those reasons or to show that they were pretextual. App. 7-8.

Petitioner seeks review solely on the basis of the lower courts' application of the "same actor" inference, which permits an inference that the same individuals who hired or promoted an employee did not subsequently act with discriminatory animus. *See Evans v. Technologies Appl. & Serv. Co.*, 80 F.3d 954, 959 (4th Cir. 1996). Every federal circuit has applied some variation of the "same actor" inference, though recognizing that the inference can be overcome by evidence put forth by the plaintiff. *See, e.g., Antonio v. Sygma Network, Inc.*, 458 F.3d 1177, 1183 (10th Cir. 2006) (adopting "same actor" inference and recognizing application "by varying degrees" by 1st, 2d, 3rd, 4th, 6th, 7th, 8th, 9th, and 11th circuits) (internal citations omitted); *Waterhouse v. Dist. of Columbia*, 124 F. Supp.2d 1, 12-13 (D.D.C. 2000), *aff'd*, 298 F.3d 989, 996 (D.C.C. 2002) (applying inference and recognizing application in 2d, 4th, 5th, 6th, 7th, 9th, and 11th circuits) (internal citations omitted).

There is no basis for Petitioner's suggestion that the "same actor" inference is precluded by this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) (holding that a plaintiff's *prima facie* case, coupled with evidence that an employer's stated reason for its actions is false or pretextual, is sufficient to withstand an employer's motion for summary judgment). *Id.* at 120. No federal court has held that *Reeves* precludes use of the "same actor" inference. *Reeves* has no application here because both lower courts concluded that the Petitioner not only failed to make out

a *prima facie* case of discrimination, but also failed to put forth any evidence of pretext. App. 7-8, 21-22. Thus, it was the complete dearth of evidence showing discrimination, not merely the "same actor" inference, that warranted summary judgment here. Accordingly, this case presents a poor vehicle for consideration of the legal questions posed in the petition, since resolution of those issues is unlikely to alter the outcome in this case.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

DOUGLAS F. GANSLER,
Attorney General of Maryland

STEVEN M. SULLIVAN
CYNTHIA G. PELTZMAN
Assistant Attorneys General
200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6324

Attorneys for Respondents

February 26, 2007